

FILED BY CLERK

JUN 25 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ANTHONY RICHARD ENCINAS,

Appellant.

)
)
) 2 CA-CR 2009-0182
) DEPARTMENT A
)

) MEMORANDUM DECISION
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080169

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan

Tucson
Attorneys for Appellee

Patrick C. Coppen

Tucson
Attorney for Appellant

E S P I N O S A, Presiding Judge.

¶1 After a jury trial, Anthony Encinas was convicted of first-degree murder, attempted robbery, and attempted aggravated robbery. He was sentenced to a life term of imprisonment for the murder, to be served consecutively to concurrent sentences for the robbery charges, the longer of which was 4.5 years. We affirm his convictions and sentences for first-degree murder and attempted aggravated robbery, but vacate his conviction and sentence for attempted robbery.

Factual and Procedural History

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). Late one night in January 2008, fourteen-year-old S. was walking to meet D. and another friend when Encinas and a fellow gang member approached him and demanded that he empty his pockets. S. complied and was allowed to leave. Later, when S. and his friends walked past the same area, Encinas and his accomplice confronted them again. This time, however, Encinas pulled a revolver from the waistband of his pants and shot D. in the chest, fatally wounding him. Encinas fled the scene and was arrested the next day.

Discussion

Attempted Robbery Conviction

¶3 Encinas first argues we should vacate his conviction and sentence for attempted robbery because this conviction violated his right to protection against double jeopardy. The state concedes error, and we agree. The jury convicted Encinas of both attempted aggravated robbery and attempted robbery based on his initial confrontation with S. But robbery is a lesser-included offense of aggravated robbery. *See* A.R.S.

§ 13-1903 (defining aggravated robbery as robbery aided by one or more accomplice); *see also State v. Gooch*, 139 Ariz. 365, 366, 678 P.2d 946, 947 (1984)(crime is lesser-included offense if it is necessarily a constituent part of major offense). Accordingly, conviction for both crimes was improper, *see State v. Welch*, 198 Ariz. 554, ¶ 6, 12 P.3d 229, 230-31 (App. 2000), and we vacate his conviction for attempted robbery, *see State v. Jones*, 185 Ariz. 403, 407-08, 916 P.2d 1119, 1123-24 (App. 1995) (when defendant convicted of both greater- and lesser-included offense based on same conduct, lesser-included offense conviction will be vacated).

Prosecutorial Misconduct

¶4 Encinas next argues the trial court committed reversible error by failing to grant his motion for a mistrial based on prosecutorial misconduct. Absent an abuse of discretion, we will not disturb the court's ruling. *State v. Sarullo*, 219 Ariz. 431, ¶ 23, 199 P.3d 686, 692 (App. 2008). To warrant reversal, the defendant must both show the state's actions were improper and there existed a reasonable likelihood these actions could have affected the jury's verdict, denying the defendant a fair trial. *State v. Montano*, 204 Ariz. 413, ¶ 70, 65 P.3d 61, 75 (2003). Encinas has shown neither.

¶5 Prior to trial, the court denied the state's motion to cross-examine Encinas about the facts underlying a previous felony conviction.¹ At trial, Encinas testified in his own defense, claiming he had shot D. accidentally and that the gun did not belong to him. To refute Encinas's account, the prosecutor elicited testimony that Encinas was on

¹The state had argued the circumstances of the prior felony were similar to those in the present case and were admissible under Rule 404(b), Ariz. R. Evid., to contradict Encinas's claim the shooting had been accidental.

probation and not allowed to possess a gun. Encinas objected to this question and later moved for a mistrial, arguing that although the prosecutor properly could elicit testimony that Encinas was a felon and could not possess a weapon legally, the mention of probation was unduly prejudicial. The court denied the motion, concluding the question was not prejudicial and even if there had been any prejudice “it d[id]n’t rise to the level of mistrial.” The court nevertheless agreed to instruct the jury that it could not conclude Encinas was “more likely to have committed the offense just because of the fact that he was on probation at the time.”

¶6 During closing arguments, Encinas’s counsel argued the jury should accept Encinas’s testimony that D.’s death had been an accident. In rebuttal, the prosecutor argued that no testimony or physical evidence besides Encinas’s statements indicated an accident and that, as a convicted felon and gang member, he was not a credible witness. After jury instructions, Encinas again moved for a mistrial, which the trial court denied.

¶7 Encinas now challenges the trial court’s refusal to grant a mistrial, contending the prosecutor’s questions during cross-examination and remarks in closing argument constituted a “purpose[ful] violat[ion of] the trial [c]ourt’s preclusion order.” He does not explain, however, how these statements violated the court’s order barring the state from “asking [Encinas] any specific questions about his prior conviction.” The record demonstrates the prosecutor made no reference to the facts underlying Encinas’s earlier conviction. Moreover, even were we to assume that generalized references to the prior conviction and Encinas’s probation status somehow had violated either the letter or spirit of the court’s order, Encinas has shown no prejudice. *See Montano*, 204 Ariz. 413,

¶ 70, 65 P.3d at 75. Accordingly, he has failed to demonstrate that the court erred by denying his motion.

***Portillo* Instruction**

¶ 8 Finally, Encinas contends the trial court structurally erred when it instructed the jury on reasonable doubt as mandated by *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Our supreme court repeatedly has rejected challenges to that instruction, *see, e.g., State v. Glassel*, 211 Ariz. 33, ¶ 58, 116 P.3d 1193, 1210 (2005); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003), and we are bound by its rulings, *see State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007). Accordingly, we find no error.

Conclusion

¶ 9 Encinas's conviction and sentence for attempted robbery are vacated, but the remaining convictions and sentences imposed by the trial court are affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge